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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1356

JOSEPH V. FRANCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 21–33) is reported at 434 F. 2d 956. The opinion of the district court denying a motion for a new trial (Pet. App. 34–48) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1970. A petition for rehearing with suggestion for rehearing *en banc* was denied on January 19, 1971. The petition for a writ of certiorari was filed on February 16, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the information charged the commission of an offense outside the purview of the statute.

2. Whether petitioner was deprived of a fair trial by the admission of certain evidence and the prosecutor's summation.

3. Whether an instruction to the jury removed from the jury's consideration issues which by law were committed to it.

4. Whether the court could forbid general use by the defendant of logs of electronic eavesdropping revealed to the court and the parties, and determined to have had no effect in the prosecution and trial of this case.

STATUTES INVOLVED

The Labor-Management Reporting and Disclosure Procedure Act (29 U.S.C. 401 *et seq.*) provides, in pertinent part:

> § 431. *Report of labor organizations.*
>
> * * * * *
>
> (b) *Annual financial report; filing; contents.*
>
> Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year—
>
> * * * * *

(4) direct and indirect loans made to any officer, employee, or member, which aggregated more than $250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;

* * * * *

§ 437. *Time for making reports.*

* * * * *

(b) Each person required to file a report under section 431(b), 432, 433(a), or the second sentence of 433(b) of this title shall file such report within ninety days after the end of each of its fiscal years; except that where such person is subject to section 431(b), 432, 433(a), or the second sentence of 433(b) of this title, as the case may be, for only a portion of such a fiscal year (because September 14, 1959, occurs during such person's fiscal year or such person becomes subject to this chapter during its fiscal year) such person may consider that portion as the entire fiscal year in making such report.

* * * * *

§ 439. *Violations and penalties.*

* * * * *

(b) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

* * * * *

(d) Each individual required to sign reports under sections 431 and 433 of this title shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false.

STATEMENT

After a trial by jury in the Eastern District of Michigan, petitioner, the secretary-treasurer of Local 42 of the General Industrial Employees Union, was convicted on a one-count information charging him with having filed a false financial report for the local with the Secretary of Labor, in violation of 29 U.S.C. 439(b) and (d). By bill of particulars, the government specified that the report for the year 1959 failed to disclose eight loans made to petitioner between March 23 and November 18, 1959, in amounts ranging from $52.32 to $500.00 and aggregating $2,320.92 (A. 4).[1] Petitioner was sentenced to imprisonment for ten months.

The evidence showed that the 1959 report (G.X. 1), required by 29 U.S.C. 431(b), was signed by petitioner in his capacity as secretary-treasurer, and listed only one loan to petitioner during that year—a sixty-day note in the amount of $300.00. However, eight checks had been drawn on the local's bank account, corresponding to the eight loans alleged in the bill of particulars (A. 9–11, 19–23), and the government's proof was that each of these also represented a loan. Each check was signed by both petitioner and the

[1] "A." refers to the appendix in the court of appeals. "G.X." refers to government exhibits.

president of the local, who often signed checks in blank for reasons of convenience (A. 11). None of the checks was made out to petitioner, but the local's records specifically showed that on December 14, 1959, he repaid to the local the funds disbursed by each of these checks (A. 30–31). The local's former bookkeeper further testified that, at petitioner's direction, she had drawn each check and made appropriate notations on the corresponding check stub. In five instances, she had noted that petitioner was to refund the amount disbursed; in two other instances (each involving a $500.00 check) the notation was "J. Franco—credit card"; the notation as to the eighth check showed that petitioner refunded the amount disbursed on December 14, 1959 (A. 24–25).[2] The cash disbursements journal of the local also noted that petitioner was to refund each of the eight disbursements (A. 26–29).[3]

Petitioner's defense—supported by his own testimony and that of the former recording secretary of the local—was that the checks represented disburse-

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[2] The records of the local indicated that this last disbursement was payment of a bill submitted to petitioner for a case of liquor (A. 24–25). The check stub for one of the other disbursements—for $130.50—indicated that it was for "watches" (A. 24).

[3] The evidence also showed that a ninth check, in the amount of $300.00, was drawn on June 11, 1959, with a notation on the stub that it was to be refunded by petitioner (A. 17), and that the amount was refunded by him on July 1, 1959 (A. 30). Neither the bookkeeper nor petitioner himself could say whether this transaction was the $300.00 loan acknowledged on the local's report (A. 32, 49, 57).

ments which he had made on behalf of the local and thereafter repaid when they were disallowed by the executive board (A. 38, 48).[4] The local's minute book (G.X. 14) was introduced in rebuttal (A. 61–62). No minutes in that book reflected either approval or disapproval of any of his expenditures by the board (A. 64).

ARGUMENT

1. Petitioner asserts that he was "convicted of omissions which were not crimes" because two of the "loans" were made prior to the enactment of the statute (September 14, 1959) (Pet. 19). It is true that 29 U.S.C. 437(b) allowed the option of treating that portion of a fiscal year which occurred after the statute's enactment as the entire fiscal year in making the required reports. The report submitted for the local (G.X. 1) did not, however, exercise this option; it instead purported to include all financial transactions occurring during the entire year. Having chosen to report for the entire year, petitioner was required to file a report which truthfully reflected the transactions for that year. Cf. *United States* v. *Knox*, 396 U.S. 77. In any event, petitioner was not charged with specific disclosure omissions, but rather with

[4] The recording secretary testified that the executive board did not consider the disbursements to be loans (A. 44). He explained, however, that some of the disallowed disbursements involved salary advances which petitioner had taken (A. 40), and that $1814.00 of the disbursements were payments made to American Express for expenses incurred by petitioner on his credit card, which were disallowed by the board when petitioner acknowledged that they were of a personal nature (A. 42–43).

falsely reporting fewer loans than were actually made. The evidence established that even disregarding the challenged items (which totalled $204.29), the report understated the loans made by $2,116.63. There was no testimony tending to set the challenged loans apart from the later ones, and thus the conviction was necessarily based on the undisputed understatements as well as the disputed ones.

2. There is no basis for further review of petitioner's contention that he was denied a fair trial. His chief complaint centers on what appears to have been two additional loans to him—in the amount of $1,500 and $1,000—which came to the attention of the jury. The first was discovered by the jurors themselves, during their deliberations in the course of examining the minute book properly admitted into evidence to rebut petitioner's defense (*supra*, p. 6; A. 80–81). Petitioner asked the court to instruct that this item was irrelevant and immaterial (A. 81); the government joined the request (A. 82) and the court granted it, explicitly informing the jury that the only transactions at issue were the eight specified in the bill of particulars (A. 83–84). Petitioner expressed no dissatisfaction with this handling of the matter. See Pet. App. 29; 434 F. 2d at 961.

The $1,000 loan was brought out on cross-examination to contradict petitioner's testimony that he limited disclosure in the local's report to the one $300.00 loan in reliance on the local's financial report, prepared by its accountants (A. 53–54). That financial report (G.X. 13) showed as a loans receivable

item that on December 31, 1959 he owed the local $1,000.00 (A. 54–55); the government was permitted to question him about the report for impeachment purposes (A. 55).[5] In view of the limited purpose for which the matter was raised, and the court's later instruction that the only transactions at issue were those specified in the bill of particulars, the claim of constitutional error is untenable. See Pet. App. 26; 434 F. 2d at 960.[6]

3. The court did not invade the jury's function on its instruction that "the information that was contained in [the local's] report was of a material nature" (A. 73). Materiality is a question of law, not, as petitioner contends, a mixed question of law and fact. *Sinclair* v. *United States,* 279 U.S. 263, 298. It remained for the jury to decide whether the disbursements constituted loans, and the court made this responsibility clear in its instructions (A. 75).

4. Subsequent to trial, the government discovered that petitioner had been the subject of electronic surveillance on various occasions during 1963 and 1964.

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[5] The financial report was admitted as a government exhibit during recross examination of the former recording secretary of the local, who testified for petitioner. The only objection raised was that the exhibit was not properly identified (A. 45). The witness was then asked, in light of his testimony that the eight checks were not considered to be loans, whether he considered the $1000.00 item to be a loan (A. 46). Upon objection on grounds of relevancy, the question was withdrawn (A. 47).

[6] Petitioner's remaining contentions of this general nature are frivolous. The prosecutor's suggestion in his summation that petitioner had used the union treasury as his personal bank account (A. 72; Pet. 9) was a fair inference from the evidence. There is no merit to petitioner's claim that he was prejudiced by association with the Teamster's Union.

It offered the transcripts of the monitored conversations to the court for inspection *in camera*, stating its own conclusion that there was no connection between the monitored conversations and the evidence of investigative leads in this case; the Department of Labor agent in charge of the investigation was unaware of the surveillance (A. 86–87). The court then made the transcripts available to petitioner and his attorney, subject to a protective order, Fed. R. Crim. P. 16(e), forbidding them to disclose or discuss the contents elsewhere. It subsequently denied motions to lift or amend the order to permit use of the information the transcripts contained in other cases or to broaden the inquiry in this one (A. 91–92, 98–102).

The district court's unchallenged determination that the electronic surveillance logs revealed nothing connected with the investigation or trial of this case (A. 108; Pet. App. 39)—a determination made after counsel had inspected the transcripts under the protective order—precludes petitioner's claim to further relief in this case. The purpose of requiring that a defendant be shown transcripts of electronic surveillance is to enable him to show, by "well-informed advocacy," *Alderman* v. *United States*, 394 U.S. 165, 184, the "special significance" of "information [which] may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances." *Id.* at 182. This purpose was fully served once the transcripts were made available to petitioner and his principal attorney; the burden was upon him to point out the "special significance" which made them "possible

sources of taint." *United States* v. *Battaglia,* 432 F. 2d 1115, 1117 (C.A. 7), certiorari denied, February 22, 1971, No. 1032, this Term; see also *Alderman* v. *United States, supra,* 394 U.S. at 183. Petitioner cannot claim prejudice in this case because the transcripts were withheld from an attorney representing him in another case, or from others similarly remote from these proceedings. This Court has never suggested that a new trial is required where, after full disclosure to the defendant, lack of taint is clear on the record.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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